THE PACIFIC BANK BHD

v.

TSAN TECK HIA

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: MT1-22-611-2000]
6 JUNE 2002

CIVIL PROCEDURE: *Summary judgment - Service of application for summary judgment - Defendant served with affidavits and copy of unsealed copy of application - Subsequent service of sealed copy of application without affidavits - Whether in breach of O. 14 r. 2(3) of Rules of High Court 1980*

The defendant had defaulted on a loan obtained from the plaintiff. When the plaintiff failed to secure the sum together with interest from the defendant, it commenced summary proceedings against the defendant. On 1 June 2001, the plaintiff filed the summons in chambers and the supporting affidavit for the summary application and on 5 June, served the defendant with the supporting affidavit with an unsealed copy of the application. The defendant did not take any action on the matter as an unsealed application imposed no obligation on him to reply. On 30 July, the court returned the sealed application copies to the plaintiff and was served on the defendant on 9 August. The plaintiff however did not serve another copy of the affidavit to the defendant together with the said sealed copy of the application within 14 days but instead three months later. It was the defendant's contention that as the sealed copy of the application was not accompanied by an affidavit at the relevant time, he was prevented from replying. The trial judge, exercising his revisionary powers, sought to consider whether the service of the sealed application without an affidavit complied with the provisions of the Rules of the High Court 1980 ('the RHC') in the circumstances.

Held:

[1] Order 14 r. 2(3) of the RHC requires the affidavit in support, and any exhibits referred to therein, be served on the defendant within 14 days from the date of issue of the summons. The date of issue was construed to mean the date whence the sealed copies were received from the court, *ie*, after it had been officially processed. (pp 526 c & 527 g)

[2] As the defendant was already in possession of the first supporting affidavit, and the same time aware of such possession, it must be construed as if the defendant had been served simultaneously with the sealed summons

on 9 August 2001. In the *CIMB Securities* case, it was stated that there was no legal requirement for the sealed summons and the supporting affidavit to be served at the same time. (pp 527 i & 528 a, c)

[Defendant ordered to file affidavit in reply and matter to be re-heard by SAR on merits of summary application.]

Case(s) referred to:
CIMB Securities Sdn Bhd v. Lee Lai & Anor [2000] 3 CLJ 564 ***(refd)***
Perbadanan Nasional Insurance Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(refd)***
Ratnam v. Cumarasamy & Anor [1962] MLJ 330 ***(refd)***
Structural Concrete Sdn Bhd & Ors v. Wing Teik Holdings Bhd [1997] 1 CLJ 300 ***(refd)***
Tetuan J & S Holdings Sdn Bhd v. A Karim Hassan [2000] 4 CLJ 152 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
Rules of the High Court 1980, O. 14 r. 2(3), O. 32 r. 13(2)

For the plaintiff - YH The; M/s KY Foo & Co
For the defendant - Anandaraj (Rafizi Zainal Abidin); M/s Mohamad Jefri, Anandaraj, Paul & Assoc

Reported by M Maheswaran

JUDGMENT

Suriyadi Halim Omar J:
Pursuant to a loan agreement dated 30 May 1996 the plaintiff had executed a term loan with the defendant whereby a sum of RM421,000 was disbursed subsequently to the latter. Unfortunately the business transaction turned sour when the defendant defaulted in his monthly instalments, culminating in the plaintiff demanding the return of the whole loan, together with the interest. After a civil suit had been filed in the High Court of Shah Alam, the plaintiff subsequently filed the impugned summons-in-chambers praying for summary judgment against the defendant, for an accumulated sum of RM451,252.63.

The matter was later fixed for hearing before the senior assistant registrar, but before it could begin the defendant posed a preliminary objection. After hearing the objection the senior assistant registrar agreed with him and set aside the summary application. Being dissatisfied with that decision the plaintiff had filed a notice of appeal. History repeated itself when before I could even start-off with the appeal, the defendant respondent posed a preliminary objection on the premise that the decision of the senior assistant registrar was not a final order pursuant to s. 3 of the Courts of Judicature Act 1964. That being so it was not appealable.

After appreciating the brief facts, the preliminary objection at the senior assistant registrar's stage, the glaring mistake made by the latter, and the new preliminary objection posed by the defendant respondent before me, and with the agreement of both parties I invoked my revisionary powers (*Tetuan J&S Holdings Sdn. Bhd. v. A Karim bin Hassan* [2000] 4 CLJ 152; *Ratnam v. Cumarasamy & Anor*. [1962] MLJ 330). I thenceforth set aside the order of the senior assistant registrar and ordered the matter be sent back to the latter to hear the merits of the summary application. I now supply my reasons for the decision.

On 1 June 2001 the summons in chambers and the supporting affidavit for the summary application (hereinafter referred to as 'the application'), were filed simultaneously at the Shah Alam High Court registry by the plaintiff. On 6 June 2001 (five days after filing) the defendant was conjointly served with the supporting affidavit and the unsealed copy of the application. Not surprisingly the defendant took no action, as the law does not impose any obligation on him to react by filing any affidavits-in-reply, at that stage. Only after having received the sealed copy of the application, will there be a necessity to serve an affidavit-in-reply, ie, if there is any to reply. Dato' Siti Norma Yaakob JCA in *Perbadanan Nasional Insurance Sdn. Bhd. v. Pua Lai Ong* [1996] 3 CLJ 321 had occasion to say:

> The affidavit in support cannot exist on its own independently of the summons and until the summons that it supports is sealed, the affidavit has no legal effect and neither does it create any obligation on the part of the party served with such an affidavit to reply to it.

On 30 July 2001 the court eventually returned the sealed application copies to the plaintiff, whereupon the latter served the sealed copy on the defendant on 9 August 2001 (nine days after receipt). I was satisfied that the service on the plaintiff was within time as O. 14 r. 2(3) of the Rules of the High Court 1980 clearly provides that "the summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant within 14 days from the date of issue of the summons" (PU(A) 342/00). To equate the phrase "date of issue" to be the date when the summons was filed and not the date when the sealed summons was returned, will invariably create unusual results, as most of the returned sealed copies will by then be no good to anyone. It is generally accepted by the legal fraternity that copies of sealed summons, especially in problem-ridden Shah Alam, may take months to be returned to the concerned solicitors' firm, hence the above observation.

To delve slightly further on this phrase of 'date of issue', it is quite necessary for me to refer to other related provisions, for analogy purposes. The unamended version of O. 14 r. 2(3) reads that the 'summons together with a

copy of the affidavit must be served not less than four clear days before the return date of the summons'. Here the phrase adverted to is 'return date' and not the current discussed phrase. Let us now peruse the phrase adverted to under O. 32 r. 13(2) of the Rules of the High Court 1980. In brief it provides that the affidavit in support of an application must be filed and served on the other party within 14 days from the date of filing (and not the date of sealing or extraction of the sealed copy of the summons; *Structural Concrete Sdn. Bhd. @ Ors v. Wing Teik Holdings Berhad* [1997] 1 CLJ 300). Appreciating the relevant phrases, *viz.* 'date of filing', 'return date' and 'date of issue' one cannot but conclude that Parliament must have been quite conscious in its deliberations when legislating distinctly different terminologies for different provisions. To reiterate, I cannot but conclude that the phrase "the date of issue" in the circumstances of this case must mean the date when the court returned the sealed summons to the plaintiff ie, after it had been officially processed.

That being so, in the circumstances of the case, the requirements of the law would not have been satisfied had the plaintiff served the defendant the unsealed summons. This is regardless of the silence under O. 14 whether the copy served ought to be sealed first or not. In the above case of *Perbadanan Nasional Insurance Sdn. Bhd. v. Pua Lai Ong* Her Ladyship Dato' Siti Norma Yaacob JCA had succinctly remarked:

> We now ask ourselves what is the status of the affidavit in support served together with the unsealed summons? Does it require an immediate reply by the respondent within the 14 days required by the Rules?
>
> We reply in the negative as the purpose of serving the unsealed copy of the summons and the affidavit in support can do nothing more than to give due notice to the respondent of the nature of the application and the grounds supporting the application. It cannot do anything more than this as the **unsealed copy of the summons has yet to get the official stamp of the court to clothe it with the authority that it has been issued.** (emphasis added)

For some unknown reason the plaintiff here had not served another affidavit either at the same time or within 14 days after service of the sealed application. Due to the non-service of a supporting affidavit the defendant complained that he was thus prevented from replying, with that attitude transplanted in a letter sent to the plaintiff. In response to that stance the plaintiff posted another affidavit to the defendant *vide* a letter dated 30 October 2001, three months after the date of issue of the sealed application.

Admittedly, when the first affidavit was served conjointly with the unsealed summons, and as an affidavit in support could not exist independently of the summons, there was no legal obligation on the part of the defendant to reply

to it. I was of the view that, as per the facts here, even though the plaintiff had later merely served the sealed summons without another affidavit after having received the processed summons from the court, but as a copy had been served on the defendant earlier, the prerequisites of the Rules of the High Court 1980 had been satisfied.

I was unable to find any logic for the plaintiff to serve another copy of the affidavit when the defendant was already in possession of an exact replica. One must bear in mind that even though the facts of *Perbadanan Nasional Insurans Sdn. Bhd. v. Pua Lai Ong* are distinguishable to the current case, yet in a peculiar way supports my view. In the above case the affidavit had been served together with the unsealed summons on 3 March 1995. Later ie, on 12 April 1995 the plaintiff served on the defendant the sealed summons together with another supporting affidavit.

The respondent replied on 14 April 1995 ie, two days after receiving the supporting affidavit. In brief the issue to be resolved before the High Court, and later also taken up at the Court of Appeal was, when did time start to run for the respondent to reply the supporting affidavit. Was it on 3 March or 12 April? The court held that as an affidavit in support could not exist independently of the summons, and until the summons it supported was sealed, as on 3 March it had no legal effect. In essence the obligation to reply existed only after 12 April thus making the service of the affidavit-in-reply as being good. Perusing the case further, the court was only concerned with the question of when the obligation to reply arose and no more. The plaintiff there must have chosen to ignore the first affidavit filed on 3 March as the second affidavit was served together with the sealed copy. Came the hearing date, for tactical reason the plaintiff blew hot and cold and wanted the court to recognise the first affidavit as the effective affidavit, and not the later one of 12 April which it had served even though unsolicited by the defendant. If the plaintiff had succeeded, in all certainty the defendant would have been in deep trouble.

Order 14 r. 2(3) requires the affidavit in support, and any exhibits referred to therein, be served on the defendant within 14 days from the date of issue of the summons. In our current case the date of issue of the sealed summons was 30 July 2001, and if no supporting affidavit had been served on the defendant within that period after that summons had been issued, the above provision thus would not have been adhered to. Needless to say, the moment the summons is clothed with the necessary authority on the date of the issue of the summons, and an affidavit had been served, thus fulfilling all the requirements of the law, the plaintiff would have been home and dry. It must also be borne in mind that there is no legal requirement for the sealed

summons and the supporting affidavit to be served at the same time. Steve Shim J (as his Lordship then was) in *CIMB Securities Sdn. Bhd. v. Lee Lai @ Anor* [2000] 3 CLJ 564 had occasion to say:

> There is nothing expressly stated in O. 14 r. 2(3) that the summons and the supporting affidavit have to be served conjointly nor can any such implication arise therefrom. In my view, there is no absolute obligation on the part of the plaintiff and/or their solicitors to serve such documents conjointly on the defendants and/or their solicitors although of course ideally this should be done. Indeed, in almost every case, such documents have been served conjointly as a matter of course.

As I see it here, as the defendant was already in possession of the first supporting affidavit, and at the same time aware of such possession, I must construe it as if the defendant had been served simultaneously with the sealed summons on 9 August 2001. I cannot see the logic of retrieving the affidavit from the defendant, and then ceremoniously handing it over again, or serving an exact replica of the affidavit, merely to adhere to the provision to the hilt. Surely to do the latter will border on the ridiculous. The defendant in the circumstances of the case, who already had prior notice of the case, and aware of the facts surrounding it, also had suffered no prejudice.

Based on the above reasons I was satisfied that the plaintiff had faithfully adhered to the provisions in that not only the summons had been served but also the supporting affidavits. At the end of the hearing, bearing in mind the peculiar background facts of the case, I also had ordered the defendant to file the affidavit in reply within 14 days, with effect from the date of my decision.